No. 83-1914

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JEFFERSON COUNTY, KENTUCKY,
DETECTIVE JONES,
LIEUTENANT COLONEL ROEMELE,
LIEUTENANT SPELLMAN,
DETECTIVE TANGEL,
SERGEANT W. HOWARD, and
DETECTIVE CHESER, - - - - Petitioners

versus

EARL M. BUCHANAN - - - - Respondent

On Writ of Certiorari to
The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Section 413.310, Kentucky Revised Statutes ["KRS"] provides: "The time of a confinement of the plaintiff in the penitentiary shall not be counted as part of the period limited for the commencement of an action."

The Sixth Circuit Court of Appeals held in *Buchanan* v. *Jefferson County, et al.*, No. 83-5143, Opinion filed 2/14/84, that this state tolling statute must be applied to a prisoner's 42 U.S.C. §1983 claim, which was otherwise untimely filed, under the authority of *Board of Regents* v. *Tomanio,* 446 U. S. 478 (1980). The questions thus presented are:

1. Should a state prisoner be entitled to invoke a state tolling statute to cure an otherwise stale claim under 42 U.S.C. §1983 when federal law requires prisoners to have meaningful access to the courts by mandating prisoners be given access to law libraries, forms for filing complaints against public officials, notarial services, postage and writing materials, etc., all at state expense?

2. When a prevailing party presents alternate grounds in support of the District Court's judgment, both of which were presented to the lower court, is the Court of Appeals required to dispose of both controlling questions before determining the case?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

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v.

EARL M. BUCHANAN - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on February 14, 1984.

OPINIONS BELOW

The February 14, 1984 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unreported and is reprinted in the Appendix to this Petition, pp. 1a-3a. The prior opinion of the United

States District Court for the Western District of Kentucky entered February 11, 1983 is also unreported and is reprinted in the Appendix to this Petition, pp. 4a-6a.

JURISDICTION

The judgment of the Court of Appeals was entered February 14, 1984. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, or citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The case also involves Title 42, United States Code, Section 1983, which provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the juris-

diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The case also involves Title 42, United States Code, Section 1988 which provides as follows:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "Civil Rights," and of title "Crimes," for the protection of all persons in the United States and their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal causes is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], title IX of

> Public Law 92-318 [20 U.S.C. §§1681, et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs".

The case also involves Section 413.140(1)(c), Kentucky Revised Statutes which provides as follows:

> "(1) The following action(s) shall be commenced within one (1) year after the cause of action accrued:
>
> . . . .
>
> "(c) an action for malicious prosecution, conspiracy, arrest, reduction, criminal conversation or breach of promise of marriage".

The case also involves Section 413.310, Kentucky Revised Statutes which provides as follows:

> "The time of confinement of the plaintiff in the penitentiary shall not be counted as part of the period limited for the commencement of an action".

STATEMENT OF THE CASE

This is a civil rights action originally brought by Earl M. Buchanan, a prisoner at the Eddyville State Penitentiary, Eddyville, Kentucky, pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343. On September 29, 1982 Plaintiff filed his complaint, *pro se* and *in forma pauperis* against the Defendants, alleging false arrest and malicious prosecution. Plaintiff's Complaint was submitted in a form apparently provided by the penitentiary. On October 19, 1982, Chief United States

Magistrate, George J. Long, entered an Order that the Complaint be filed and granted leave for the Plaintiff to proceed *in forma pauperis*. The case was assigned to the Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky at Louisville.

In his *pro se* complaint the Plaintiff alleged that he was taken into custody without probable cause on January 14, 1981, by officers of the Jefferson County, Kentucky, Police Department, during the execution of an arrest warrant for plaintiff's brother, Calvin Buchanan, and the concomitant execution of a search warrant for premises located at 3703 West Kentucky Street, Louisville, Kentucky.

The underlying information contained in these warrants was obtained from one Kevin Stanford, a 17 year old male, who had confessed to the murder of Baerbell C. Poore, a Checker gas station attendant. Poore was found dead in the backseat of her car on January 8, 1981 after she had been abducted during the robbery of the Checker gas station Poore had been sodomized and shot twice in the head. Stanford implicated Calvin Buchanan as a co-perpetrator of the crime and also stated that a weapon used in the crime was a sawed-off shotgun which was the property of a person known as "Doc" who lived with Calvin Buchanan at the West Kentucky Street address. Further, Stanford also implicated Earl Buchanan, the Plaintiff in the instant matter, as a participant in a robbery of a "Short Stop Food Mart" at Louisville on December 24, 1980. A shotgun was used in the Short Stop rob-

bery which also fit the description of the weapon named in the search warrant.

The Stanford information gained by the police from Stanford was incorporated in an affidavit and presented to Jefferson County, Kentucky District Court Judge Ken Corey on January 14, 1981. Judge Corey issued both a search warrant for the 3703 West Kentucky Street premises and an arrest warrant for Calvin C. Buchanan.

Numerous factors supplied the requisite probable cause for Earl Buchanan's arrest. First, the sawed-off shotgun identified in the search warrant was found at the West Kentucky Street location. Second, Stanford had implicated Earl Buchanan in the robbery of the Short Stop Food Mart. Third, Earl Buchanan fit a description given by at least one witness to the Short Stop robbery. Fourth, Earl Buchanan's sister, Colleen Brookins, lived in the apartments behind the Short Stop Food Mart, the very same direction in which the robbers had reportedly fled. All of this information was within the knowledge of the arresting officers on the night of January 14, 1981 (App. 22a-33a, Affidavits of Tangel and Cheser).

Earl Buchanan was read his rights, taken to Police Headquarters, handcuffed to a chair and kept in a room by himself at the Police Headquarters. An opportunity was provided to telephone his counsel, which he did, and to use the restroom facilities. Seven lineups were then conducted by the police, during which Mr. Buchanan was represented by Jefferson District Public Defender, Raymond Clooney. During the lineups, a

witness to the Short Stop robbery positively identified Earl Buchanan as one of the participants in the robbery and signed a statement to that effect (App. 30a, Affidavit of Cheser).

Earl Buchanan was then formally charged with the Short Stop robbery and placed in the custody of the Louisville and Jefferson County Metropolitan Corrections Department. Subsequently on March 4, 1981, a Grand Jury indictment for the Short Stop robbery was handed down against Earl Buchanan. Assistant Commonwealth Attorney, William C. Grimes, handled the case for the Commonwealth (App. 35a, Affidavit of Grimes).

Eventually the Short Stop robbery charges were dismissed, based upon a prosecutorial decision, under the following circumstances:

Earl Buchanan was convicted on another outstanding unrelated felony indictment on June 11, 1981, and sentenced to the Eddyville, Kentucky State Penitentiary as a persistent felony offender. The case against Earl Buchanan involving the Short Stop robbery was dropped by the Commonwealth on June 24, 1981, the date originally set for the trial, because Prosecutor Grimes concluded that such action was in the interest of judicial economy in light of Plaintiff's then recent conviction on the persistent felony offense for which he was sentenced to 20 years in the penitentiary. Further, Mr. Grimes believes that the identification of Plaintiff by the witnesses was impeachable since two earlier suspects had also been identified by the same witnesses (App. 35a-41a, Grimes Affidavit).

All of the foregoing facts and information surrounding the arrest and prosecution of Earl Buchanan were contained in affidavits filed in the District Court civil rights case with a motion for summary judgment on behalf of Defendants below [Petitioners here], with a memorandum in support thereof on January 12, 1983 (App. 7a-41a). The Defendants asserted two separate grounds for summary judgment in the District Court. First, Defendants argued that the complaint was not filed within the applicable period of limitations for false arrest and malicious prosecution, KRS 413.-140(1)(c) which provides for a one year period within which to file such actions. Second, that based upon the affidavits of the Defendants and others, the search warrant, and the arrest warrant, and the subsequent Grand Jury indictment, it was demonstrated beyond plausible doubt, and as a matter of law, that the Petitioner had probable cause to arrest Earl Buchanan.

On February 7, 1983, in the District Court Earl Buchanan filed a response to Petitioner's motion for summary judgment which did not include any rebutting affidavits. Thereafter, by Memorandum Opinion and Order dated February 11, 1983, the District Court granted summary judgment to Petitioners based upon the failure of Earl Buchanan to file his action within the applicable period of limitation. The District Court also stated, "[B]ecause the statute had run well before the filing of the Complaint, we need not consider the issue of probable cause." (App. 5a, Memorandum Opinion of District Court, p. 1, dated 2/11/83.)

On February 24, 1983 Buchanan appealed the District Court dismissal to the United States Court of Appeals for the Sixth Circuit. After the case had been briefed, but before oral argument, on February 14, 1984, the Court of Appeals issued an Order reversing the District Court's Judgment (App. 1a-3a). Again, the judgment of the Court of Appeals was based solely on the issue of limitations, and did not address the probable cause and good faith issues which that Court had been requested to consider.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals in this case directly conflicts with the Opinion of the Ninth Circuit Court of Appeals in *Major* v. *Arizona State Prison,* 642 F. 2d 311 (9th Cir. 1981), holding that a prisoner's Section 1983 action was barred by a state statute of limitation despite a savings provision similar in nature to the statute in question here. The Court of Appeals in this case has therefore rendered a decision in conflict with the decision of another federal court of appeals as to the same matter.

Further, Petitioners respectfully submit that the Court of Appeals in this case has misconstrued the application of *Board of Regents* v. *Tomanio,* 446 U. S. 478 (1978), in that its judgment reflects an interpretation of *Tomanio* which requires blanket application of state tolling statutes without regard to a determination of whether ". . . the state law is inconsistent with the Constitution and laws of the United States." *Id.* at p. 485. The Court of Appeals failed to examine the

applicable Kentucky statute at issue here, in light of its probable inconsistency with prevailing federal law, before invoking its application to Petitioner's cause.

As an additional reason for granting the Writ in this case, Petitioners respectfully assert that the Court of Appeals significantly departed from the accepted and usual course of judicial proceeding by failing to examine Petitioners' other bases in support of the District Court's Judgment dismissing Buchanan's complaint. It is a well settled matter of law that a prevailing party may assert in the appellate court any ground in support of a judgment, whether the lower court relied upon such ground or even considered it. *Dandridge* v. *Williams,* 397 U. S. 471 (1970), *Jaffke* v. *Dunham,* 352 U. S. 280 (1957). Even the Sixth Circuit Court of Appeals recognized as early as 1939 that ". . . a judgment must be affirmed if right for any reason, however erroneous the reasons leading to it may be." *American Eagle Fire Insurance Company* v. *Gayle,* 108 F. 2d 116, 117 (6th Cir., 1939).

Based on the foregoing, it appears that the Sixth Circuit Court of Appeals "has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court of the United States.

I. KRS 413.310 Is Inconsistent with the Policy of Deterrence Inherent in 42 U.S.C. §1983.

In *Board of Regents* v. *Tomanio, supra,* this Court held that state statutes of limitation and corresponding tolling rules are to be applied in actions brought under 42 U.S.C. §1983 *except* where such statutes are inconsistent with federal law. In *Tomanio,* this Court considered the question of whether Tomanio's action challenging the alleged unconstitutional denial of her application for waiver of a chiropractic licensing examination was barred by a New York statute of limitations. Upon review, this Court could find nothing in New York law which would toll an otherwise applicable statute of limitations. Thus, this Court held that the New York tolling provisions did not save Tomanio's federal action; and that such a conclusion was not inconsistent with the provisions of 42 U.S.C. §1983.

In the case here, Petitioners present the converse of the situation which attended in *Tomanio.* Here, the Kentucky statute, KRS 413.310 tolls the running of a statute of limitation for the period during which a prisoner is confined to a state penitentiary. Petitioners assert that such a tolling provision *is* inconsistent with federal law.

As *Tomanio* noted, the authority for a federal court to disregard an otherwise applicable state rule of law for inconsistency with federal law is found in 42 U.S.C. §1988. *Tomanio* also recognized several principal policies embodied in §1983 which should be examined to determine whether an otherwise applicable state rule of law is inconsistent with federal law. The policies

specifically mentioned in *Tomanio* are deterrence, compensation, and uniformity; *Tomanio, supra,* at pp. 488-489. It is apparent that the Kentucky tolling statute in question here, KRS 413.310, is inconsistent with the policies of deterrence and uniformity.

Rhetorically stated, how can the policy of deterrence be effectively implemented if a prisoner is permitted to slumber on his rights during a long period of incarceration? Obviously, it is much preferrable to litigate alleged violations at a point in time when the evidence and testimony relative to a claim are fresh and easily accessible. This is the precise reason that statutes of limitations exists because, as *Tomanio* held:

> ". . . there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious." *Tomanio, supra* at 487.

Naturally, the argument can be made that KRS 413.310, which dates back to 1873, was enacted to permit prisoners to pursue civil actions that may have arisen prior to the time or during the time of their incarceration when they ordinarily have limited access to civil courts. However, due mainly to this Court's decision in *Bounds* v. *Smith, et al.,* 430 U.S. 817 (1977), this statute is not only an anachronism as it relates to federal actions under 42 U.S.C. §1983 but, it is directly contrary to federal law.

Bounds, supra, laid to rest any question that state authorities could inhibit inmates' access to federal courts and, indeed, provided prisoners with a plethora of rights which had to be provided at state expense. Specifically, *Bounds* held:

> "We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.,* at 828.

This Court further noted that inmates must be provided with fundamental tools such as paper and pen to draft legal documents; must be provided free notarial services to authenticate the documents; must be provided with necessary postage to mail documents; and that docket fees must be waived and transcripts provided, all at state expense. *Id.,* at 825.

Bounds also suggested alternative forms of implementing "meaningful access to the courts" as follows:

> "Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals, and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistant organizations or as part of public defender or legal services offices." *Id.,* at 831.

In light of the total range of assistance required by *Bounds* designed to insure meaningful access to the courts by prisoners, it is inconceivable that KRS 413.-310, comports with the deterrance policy inherent in 42 U.S.C. §1983. Deterrence simply cannot be accomplished if prisoners are permitted to hide behind an antiquated and anachronistic tolling provision which has no effective place under the present standard of "meaningful access to the courts" set forth in *Bounds, supra.*

The argument that KRS 413.310 is inconsistent with the policy of deterrence embodied in 42 U.S.C. §1983 can be demonstrated by examining a Sixth Circuit Court of Appeals case, *Kirby* v. *Thomas,* 336 F. 2d 462 (6th Cir., 1964), which would be controlled by *Bounds, supra,* if decided today. In *Kirby,* the Sixth Circuit upheld a Kentucky statute prohibiting an inmate in a state penal institution from mailing or otherwise sending out legal papers or documents, other than habeas corpus or corum nobis proceedings. The Kirby court found no constitutional violations and noted:

> "Enforcement of the regulation preventing the filing of ordinary civil actions by prisoners which do not relate to their personal liberty is a matter of prison discipline and is not in violation of any constitutional restrictions." *Kirby, supra,* at p. 463.

Further, the Sixth Circuit in *Kirby* specifically noted that KRS 413.310 would preserve a prisoner's civil action until such time as he is released from imprisonment. *Id.,* at 464. Naturally, under the present

law as set forth in *Bounds, supra,* a prisoner would have an absolute right to not only file a suit pro se, but would be provided a law library, form pleadings to assist him, at least paralegal type assistance in drafting his complaint, postage to mail the complaint, access to the federal court without prepayment of a filing fee, and whatever writing materials he might need to research and prepare his case.

But, if such a situation as attended in *Kirby* were to arise in the Kentucky penal system today, nothing would prevent the affected prisoner or prisoners from waiting until release to file a civil rights action because, as specifically noted in *Kirby,* the tolling provisions of KRS 413.310 would save the cause of action. No deterrence of such unconstitutional activity by prison authorities would be effected because during the period of incarceration, while the prisoners chose to slumber on their rights, the authorities could continue their unconstitutional conduct, possibly for years. Obviously, the deterrence policy behind 42 U.S.C. §1983 is frustrated if prisoners are permitted to invoke a tolling statute in the nature of KRS 413.310 even though *Bounds, supra,* totally remedies any inhibiting factors which might otherwise prevent the filing of a suit under 42 U.S.C. §1983.

Thus, any disability due to imprisonment which could have been argued prior to *Bounds, supra,* no longer exists. In fact, *Bounds* has created a *separate federal right* of access to the civil courts specifically for prisoners, a right not generally available to non-incarcerated indigents. It is apparent that an indigent

person, possibly a vagrant, could be treated in a blatantly unconstitutional manner by authorities, say by the use of unusual force not incident to arrest, but who obviously doesn't have the readily accessible assistance available to him under *Bounds*. Such a person may not be aware of the legal services system available to him; he may not know where a law library is located; he certainly cannot afford a private attorney; probably has no idea where the federal courthouse is located; has no form pleading provided to him as a matter of right; and most likely can't even afford to buy writing materials to lodge a protest with the proper authorities, even if he knows who they are. Yet, all of these critical areas of assistance are provided to convicted *prisoners* to insure their rights to meaningful access to the courts. *Bounds* has guaranteed that if one is both indigent and a convicted felon, every effort will be made to assist him with every conceivable civil cause of action; but, if a mere indigent suffers a constitutional deprivation action under §1983 and neglects to have himself convicted and jailed, he will be left to his own resources, rather than the state's, to figure out what he should do.

Earl Buchanan's situation presents the quintessential example of how sophisticated and well schooled prisoners have become in presenting civil rights litigation. Earl Buchanan has assisted his brother, Calvin Buchanan, in the pursuit of a 42 U.S.C. §1983 claim as to the identical search and arrest warrants in question here, *Buchanan* v. *Helm, et al.*, U. S. District Court for the Western District of Kentucky, No. C-83-0913-L(B). Earl Buchanan is certainly far from inex-

perienced or naive about the legal system and has even styled himself as a "legal aide" on his brother's pleadings.[1] Without doubt this court's *Bounds* decision is being scrupulously adhered to by the Kentucky penal system.

II. KRS 413.310 Is Also Violative of the Policy of Uniformity Inherent in §1983.

As earlier stated, KRS 413.310 also violates the policy of uniformity inherent in 42 U.S.C. §1983. Admittedly, *Tomanio* did not view uniformity as so paramount as to, alone, displace state statutes of limitations but neither did *Tomanio* totally reject uniformity as a critical policy of U.S.C. §1983. As will be shown, uniformity of application has been trouble-

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[1]The Buchanan brothers, Earl and Calvin, have a rather extensive history as to the search and arrest warrants in question here. Initially, Calvin Buchanan filed suit alleging false arrest and malicious prosecution in which these same defendants were granted summary judgment by the same U. S. District Court and Judge, the Honorable Charles M. Allen. Subsequently, Judge Allen's decision was affirmed by the Sixth Circuit Court of Appeals which held that the warrants in question supplied probable cause to arrest Calvin Buchanan, *Buchanan* v. *Jefferson County, et al.*, Sixth Circuit Court of Appeals No. 82-5131, Order entered May 24, 1982 [unpublished but noted at 703 F. 2d 559 (6th Cir. 1982)]. Calvin Buchanan then applied to this Court for a Petition for Writ of Certiorari which was denied. Earl Buchanan then filed suit on the same search warrant and arrest warrant which has resulted in the instant case. Finally, after having his Petition for Writ of Certiorari denied, Calvin Buchanan, assisted by Earl, *again* filed suit in U. S. District Court, *Buchanan* v. *Jefferson County*, C-83-0913-L(B), alleging the identical cause of action raised in his previous suit, U. S. District Judge Thomas Ballantine, Jr. dismissed that complaint on the basis of res judicata. Judge Ballantine also awarded attorney's fees against Calvin Buchanan which have gone uncollected to date.

some for both the Sixth and Ninth Circuit Courts of Appeals.

In *Major* v. *Arizona State Prison,* 642 F. 2d 311 (9th Cir. 1981), a decision rendered subsequent to *Tomanio,* the Ninth Circuit held that a tolling provision similar to the one at issue in this case would not be applied to preserve a prisoner's 42 U.S.C. §1983 cause of action. An interesting aspect to *Major* is that the Ninth Circuit had applied a very similar California tolling provision to *preserve* §1983 actions of California inmates, see *May* v. *Enomoto,* 633 F. 2d 164 (9th Cir. 1980).

Similarly, the Sixth Circuit has apparently been less than consistent in the uniform application of state tolling provisions. The Sixth Circuit in this case applied Kentucky's tolling provision even though a U.S. District Court in Michigan had refused to apply the Michigan savings provision in the case of *Campbell* v. *Guy,* 520 F. Supp. 53 (S.D., Mich., 1981), another case subsequent to *Tomanio.* The *Campbell* opinion noted:

> "Incarceration, in many instances, is a disability to the commencement of legal action which properly tolls the running of a statute of limitation due to lack of free access to the courts. However, it begs reason to suggest that incarceration per se is a disability as to causes of action which have been brought pursuant to 42 U.S.C. §1983. The prosecution of meritorious claims by prisoners in the §1983 context attest to the fact that, in many instances, the federal judicial system has cured

> the historic disability which incarceration engendered."
>
> *Id.* at 55.

It is evident that the Sixth Circuit and the Ninth Circuit are in direct conflict as to their construction and application of similar tolling provisions. Further, the Ninth Circuit has apparently ruled *both* ways on similar tolling provisions for prisoners from two different states within its Circuit. Finally, prior to the Sixth Circuit's decision in this case, a U. S. District Court within the Sixth Circuit refused to apply a similar tolling provision for prisoners to preserve a §1983 cause of action. While *Tomanio* noted that nationwide uniformity in areas of civil rights may not be possible, *Tomanio, supra* at p. 489, the case did not imply that chaos should rule as appears to be the situation at least in the Sixth and Ninth Circuits.

Based on the foregoing arguments, Petitioners believe this court must determine whether state tolling provisions similar to KRS 413.310 are contrary to federal law in that they seriously interfere with the policies of deterrence and uniformity inherent in the remedial scheme of 42 U.S.C. §1983.

III. The Court of Appeals Erred by Failing to Examine Petitioner's Other Bases for Affirming the District Court's Judgment.

Petitioners also seek a Writ of Certiorari on the basis the Sixth Circuit significantly departed from the accepted and usual course of judicial proceedings by failing to examine Petitioner's other basis for af-

firming the District Court Judgment dismissing Earl Buchanan's civil complaint.

Aside from the statute of limitations argument, the Petitioners asserted that the arrest of Earl Buchanan was, as a matter of law, effected with probable cause. In that regard, the Petitioners submitted extensive affidavits and documents in support of their motion for summary judgment in the District Court, patently demonstrating that probable cause existed to arrest Earl Buchanan as a matter of law (App. 7a-41a). It is significant to note that Buchanan failed to submit any rebutting affidavits or documents in his response to Petitioner's motion for summary judgment in the District Court. The District Court dismissed Buchanan's claim on statute of limitations grounds without addressing Petitioner's probable cause argument.

In the Sixth Circuit Court of Appeals, the Petitioners again presented the probable cause argument framed both in the context of applicable law as well as the good faith standard set forth in *Harlow* v. *Fitzgerald,* 457 U. S. 800 (1982). As in the District Court, this argument was neither overlooked or ignored by the Sixth Circuit and not even mentioned in its opinion. It is beyond cavil that a prevailing party may assert in the appellate court any ground in support of a judgment below, whether the lower court relied upon such ground, or even considered it. *Dandridge* v. *Williams,* 397 U. S. 471 (1970), *Jaffke* v. *Dunham,* 352 U. S. 280 (1957). Further, the Sixth Circuit Court ignored its own precedent in this area, recognized as early as 1939, that ". . . a judgment must be

affirmed if right for any reason however erroneous the reasons leading to it may be." *American Eagle Fire Insurance Company* v. *Gayle,* 108 F. 2d 116, 117 (6th Cir. 1939).

Based on the foregoing well settled and undisputed case law, the Defendants were absolutely entitled to have the Sixth Circuit Court of Appeals at least examine Petitioner's probable cause argument to determine the sufficiency thereof with reference to the summary judgment granted by the District Court. This is especially true in light of the fact the Sixth Circuit had already examined, and upheld the sufficiency of the identical search and arrest warrants in connection with the arrest of Calvin Buchanan in the case of *Buchanan* v. *Jefferson County, et al.,* Sixth Circuit No. 82-5131, Order dated 5/24/82 [unpublished but noted at 703 F. 2d 559 (6th Cir. 1982)]. In that case, the Sixth Circuit held:

> "Upon review of the record and the affidavits submitted by the defendants in support of their motion for summary judgment, this court finds the District Court did not err in finding the arrest warrant supported by probable cause. (Citations omitted) *Id.* at p. 3.

Petitioners have included in the Appendix the affidavits of two of the Petitioners and Assistant Commonwealth Attorney Grimes. As a part of those affidavits, certain exhibits were attached which included an eyewitness identification form, the indictment of Earl Buchanan, and the search and arrest warrants in question. Although the argument of probable cause as a

matter of law and/or the good faith of the officers involved was ignored both at the District Court and the Sixth Circuit levels, it is patent that the documents included in the Appendix required summary judgment at the District Court level and affirmance in the Sixth Circuit Court of Appeals. This is especially true since the Plaintiff filed no rebutting affidavits or documents to counter the truth and accuracy of the matters contained in the affidavit and documents filed by Petitioners.

In *Gerstein* v. *Pugh,* 420 U. S. 103 (1975), this court defined probable cause for arrest as follows:

> The standard for arrest is probable cause, defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." (Citations omitted) *Id.* at p. 111.

The facts and circumstances on the morning of January 14, 1981, were clearly sufficient to establish, as a matter of law, probable cause to arrest Earl Buchanan. The police officers involved had personal knowledge relating to the so-called Short Stop robbery and the confession of Kevin Stanford implicating Earl Buchanan in the Short Stop crime. Among the facts the police officers knew or ascertained at the scene of the arrest are as follows: Earl Buchanan fit the description of a suspect in the Short Stop Food Mart robbery on December 24, 1980; a sawed-off shotgun matching the description of the one allegedly used in the Short Stop Food Mart robbery (also allegedly used in the Checker Service Station robbery as set forth in the search war-

rant) was found at the residence where Earl and Calvin Buchanan were sleeping; and, Earl Buchanan's sister lived in the apartments behind the Short Stop Food Mart, in the same direction the robbers reportedly fled. In addition, the police officers had good reason to believe Earl Buchanan would flee if not immediately taken into custody.

Thus, substantial and trustworthy evidence revealed that a violation of the law had been committed and it was more likely than not that the person to be arrested, Earl Buchanan, had committed the violation. As a matter of law, probable cause existed to arrest Earl Buchanan.

Obviously, the facts and circumstances known to the officers were sufficient to give rise to probable cause to arrest Earl Buchanan under prevailing law as succinctly set forth by Chief Justice Burger, then Circuit Judge Burger, in *Smith* v. *U. S.,* 358 F. 2d 833, 837 (1966), cert. denied, 386 U. S. 1008 (1967):

> "Probable cause is the sum total of layers of information in the synthesis of what the police have heard, what they know and what they observed as trained officers. We weigh not individual layers but the 'laminated' total."

While maximum protection of individual rights would be assured by obtaining a warrant in all situations prior to an arrest, this Court has recognized that ". . . such a requirement would constitute an intolerable handicap for legitimate law enforcement." *Gerstein* v. *Pugh, supra,* at 113. *Gerstein, supra,* went on to establish a "practical compromise" where a "police-

man's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 113-114.

It is crucial to note in the instant case that the facts supporting the arrest of Earl Buchanan were eventually placed before the Grand Jury which indicted him on March 4, 1981. The independent decision to indict by the Grand Jury can be viewed as nothing less than an endorsement of probable cause, relieving the arresting officers of any possible liability for false arrest or malicious prosecution.

Because federal courts are compelled to apply state law to determine the elements of the common law tort most closely analogous to the cause of action alleged by a §1983 complainant, it is important to note that it has been established in Kentucky for over 150 years that the finding of an indictment against the accused by the Grand Jury is prima facie or presumptive evidence of probable cause for the criminal prosecution. *Garrard* v. *Willet,* (4 J.J. Marsh), 27 Ky. 628 (1830).

Consistent with the argument on probable cause, the defense of good faith was also asserted in the Sixth Circuit. In *Pierson* v. *Ray,* 386 U. S. 547 (1967), this court stated:

> "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect was later proved (Citations omitted). A policeman's lot is not so un-

> happy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does." *Id.* at 555.

More recently, in *Harlow* v. *Fitzgerald,* 457 U. S. 800 (1982), this court clearly set forth an objective test to be used to determine good faith and noted:

> "Reliance on objective reasonableness of an officials 'conduct', as measured by reference to clearly established law, should avoid excessive disruption of government *and permit the resolution of many insubstantial claims on summary judgment.*" (emphasis added) *Id.* at 818.

The *Harlow* test focused on implication of clearly established rights so as to prevent unconstitutional acts of an official, yet preserve the public interest in permitting officials to act independently and without fear of undue consequences. In the case here, the Petitioners were faced with a situation in which they believed in good faith that probable cause existed for the arrest of Earl Buchanan. The subsequent indictment of Buchanan for the so-called Short Stop robbery conclusively demonstrated their actions were warranted and did not implicate any violation of "clearly established right." Therefore, the acts of Petitioners in arresting Earl Buchanan were of the type to be protected by the standards set forth in *Harlow* so that police officers can properly act in the public interest ". . . with independence and without fear of consequences." *Id.* at 819.

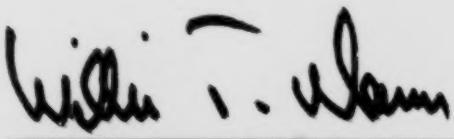
Even though the District Court and the Court of Appeals failed to decide the probable cause issue, it is clear that the Petitioners had probable cause as a matter of law to arrest Earl Buchanan; and most importantly, that they acted in good faith in effecting the arrest and subsequent prosecution.

When the probable cause issue was argued to the Court of Appeals in support of the District Court's dismissal of Buchanan's action, as permitted under *Dandridge* v. *Williams, supra,* and *Jaffke* v. *Dunham, supra,* the Court of Appeals was required to decide its merits. If the Petitioners were entitled to summary judgment based on the probable cause issue, by its own precedent, the Court of Appeals was required to affirm the District Court dismissal of Plaintiff's actions ". . . if right for any reason however erroneous the reasons leading to it may be." *American Eagle Fire Insurance Company* v. *Gayle, supra.*

CONCLUSION

For all the reasons, and upon the authorities cited and argued in this, their Petition, the Petitioners respectfully pray that a writ of certiorari be granted.

May 11, 1984.



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CERTIFICATE OF SERVICE

I, William T. Warner, a member of the Bar of this Court, representing the Petitioners herein, hereby certify that I have, this 15th day of May, 1984, served the foregoing Petition for Writ of Certiorari pursuant to Rule 28.3 of this Court upon all parties required to be served, to wit: Earl M. Buchanan, by depositing three (3) copies of the said Petition in a United States mailbox, with first-class postage prepaid, addressed to Earl M. Buchanan at his address, Kentucky State Penitentiary, Box 128, Eddyville, Kentucky 42038.

William T. Warner

WILLIAM T. WARNER

APPENDIX

No. 83-5143

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EARL MILES BUCHANAN - - - *Plaintiff-Appellant*

v.

COUNTY OF JEFFERSON;
MITCH MCCONNELL;
DETECTIVE JONES;
CHIEF EDGAR HELM;
LT. COL. ROEMELE;
LT. SPELLMAN;
DET. TANGEL;
SGT. W. HOWARD;
DET. HALL;
DET. CHESER - - - - *Defendants-Appellees*

ORDER—Filed February 14, 1984

BEFORE: LIVELY, Chief Circuit Judge; EDWARDS, Circuit Judge; and TAYLOR, District Judge.*

This pro se plaintiff appeals from a district court judgment dismissing his civil rights complaint filed under 42 U.S.C. §1983. Plaintiff sought monetary damages from a judge, a county police department and several of its officers for allegedly having falsely arrested him on January 14, 1981. The district court dismissed the complaint as being time-barred under Kentucky's one year statute of limitations for bringing claims of false arrest and malicious prosecution. The complaint was filed on October 19, 1982,

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*The Honorable Anna Diggs Taylor, Judge, U. S. District Court for the Eastern District of Michigan, sitting by designation.

which was twenty-two months after the plaintiff was arrested and sixteen months after the charges for which he was arrested were dropped. In its ruling, the district court concluded that the statute of limitations was not tolled by the plaintiff's incarceration.

Federal courts are obligated to apply the most analogous state statute of limitations and its rules for tolling the statute to the fullest extent possible consistent with the Constitution and laws of the United States. *Board of Regents* v. *Tomanio,* 446 U. S. 478 (1980). In the instant case, the most analogous Kentucky State statute of limitations is its one-year time period allowed for bringing claims of false arrest and malicious prosecution provided under K.R.S. §413.140(1)(c). *See Carmicle* v. *Weddle,* 555 F. 2d 554 (6th Cir. 1977) (per curiam). Kentucky also has a tolling statute, K.R.S. §413.310, which provides: "The time of a confinement of the plaintiff in the penitentiary shall not be counted as part of the period limited for the commencement of an action."

The Sixth Circuit has recognized the validity of this tolling statute as being available for use by Kentucky state prisoners bringing §1983 actions. *See Cunningham* v. *Jones,* 567 F. 2d 653, 654 n. 2 (6th Cir. 1977), and *Kirby* v. *Thomas,* 336 F. 2d 462 (6th Cir. 1964). The Sixth Circuit has also recognized the validity and application of other similar tolling statutes to prisoners' §1983 actions. *See Austin* v. *Brammer,* 555 F. 2d 142 (6th Cir. 1977) (per curiam) (Ohio).

Since the plaintiff was incarcerated throughout the time period prior to his filing of his lawsuit, this court concludes that the applicable Kentucky one year statute of limitations was tolled during the time of plaintiff's incarceration.

The panel unanimously agrees that oral argument is not necessary in this appeal. Rule 34(a), Federal Rules of

Appellate Procedure. The district court's judgment is, accordingly, reversed. Rule 9(d)4, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action C 82-0623 L(A)

EARL MILES BUCHANAN, - - - - - *Plaintiff,*

v.

COUNTY OF JEFFERSON, et al., - - - *Defendants.*

SUMMARY JUDGMENT

The defendant, having moved for summary judgment, and the plaintiff, having responded, and the Court, being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the defendant's motion be and it is hereby sustained, and the action dismissed with prejudice.

This is a final and appealable judgment and there is no just cause for delay.

Dated 2-11-83

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

MEMORANDUM OPINION

This action is submitted to the Court on the defendant's motion for summary judgment. The plaintiff has responded to the motion. Because we believe that this action is ruled by *Carmicle* v. *Weddle,* 555 F. 2d 554, 555 (6th Cir. 1977), we grant the defendants' motion.

This prisoner action was filed *pro se* and in forma pauperis by Earl Miles Buchanan. It alleges that Buchanan was maliciously and falsely arrested by the defendants in deprivation of his rights under the Fourteenth Amendment of the United States Constitution. The action was filed in September of 1982 under 42 U.S.C. Sec. 1983.

The arrest complained of occurred in January of 1981 and the charges were dismissed in June of 1981. Plaintiff was in prison most of the intervening time on an unrelated charge.

The defendants plead probable cause and the statute of limitations. Because the statute had run well before the filing of the complaint, we need not consider the issue of probable cause.

Actions filed under Sec. 1983 has no "internal" limitations by statute; they must rely instead on state actions to which they are most closely analogous. *Carmicle, supra; Mason* v. *Owens-Illinois, Inc.,* 517 F. 2d 520, 521 (6th Cir. 1975). This complaint clearly alleges wrongs closely akin to malicious prosecution and false arrest, and would be so construed in state court. The question then remains only whether the action was timely filed, i.e., when the cause accrued, whether it was tolled, and when it was filed.

The present cause of action accrued at the very latest when the last charges were dropped. *Farris* v. *Sears Roebuck & Co.,* 415 F. Supp. 594 (W.D. Ky. 1976). In this case that date was June 24, 1981.

The Sixth Circuit has never recognized tolling of Sec. 1983 actions for those in prison or otherwise institutionalized. *Cf. Kenney* v. *Killian,* 232 F. 2d 288 (6th Cir. 1955). Since the action was not filed until over a year after the accrual of the cause of action, the one year Kentucky malicious prosecution limitation section bars this Sec. 1983 action. Ky. Rev. Stat. Sec. 413.140(1)(c).

Wherefore, the motion was summary judgment must be granted. An order to this effect is today entered.
Dated 2-11-83

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0623-L(A)

EARL MILES BUCHANAN - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, et al. - - - - *Defendants*

MOTION FOR SUMMARY JUDGMENT

Come the Defendants, by Counsel, and move this Court, pursuant to Fed. Rule 56(b) of the Federal Rules of Civil Procedure, for Summary Judgment in favor of the Defendants on Plaintiff's cause of action.

The basis of this motion is that the Plaintiff is barred from bringing this suit because his search, arrest, imprisonment and prosecution were indisputably based upon probable cause and because this suit is barred by the applicable statute of limitations. Plaintiff has failed to raise any genuine issues of material fact thus entitling Defendants to a judgment as a matter of law.

In support of this motion, Defendants tender the attached Memorandum of Law, affidavits and exhibits.

(s) N. Scott Lilly
Assistant County Attorney
Counsel for Defendants
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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants contend that they are entitled to a judgment in their favor as a matter of law. The first and foremost reason summary judgment should be granted to the Defendants is that Plaintiff is barred from bringing this suit because his arrest and prosecution were indisputably founded upon probable cause. In addition, Plaintiff is barred from bringing this suit under the appropriate statute of limitations.

STATEMENT OF THE CASE

Before relating the pertinent facts surrounding the arrest and prosecution of Plaintiff, Defendants would like to direct the Court's attention to the Affidavits which have also been submitted in support of their Motion for Summary Judgment. These Affidavits and the Exhibits thereto provide the factual setting related below and they will be referred to throughout this memorandum.

On January 14, 1981, during the execution of an arrest warrant for Calvin Buchanan and a search warrant for 3703 W. Kentucky Street, Louisville, Kentucky, (Exhibit 1 to Tangle Affidavit) police officers found Earl Buchanan in the home, sleeping in the same bedroom with Calvin Buchanan.

Earl Buchanan was taken into custody for several reasons. First, Kevin Stanford, who was in custody for charges stemming from the same incident which resulted in the Calvin Buchanan arrest warrant implicated Earl Buchanan in the robbery of the Short Stop Food Mart at 8811 Old Third Street Road, Louisville, Kentucky, on December 24, 1980. Second, Earl Buchanan fit a perpetrator's description given by at least one witness to the Short Stop robbery. Third, a sawed off shot gun identified in the

search warrant and fitting the description of the weapon used during the subject robbery was found during the search of the 3703 W. Kentucky Street residence. Further, Earl Buchanan's sister, Colleen Brookins, lived in apartments behind the Short Stop Food Mart and is in the same direction the robbers reportedly fled. All of this information was within the knowledge of the arresting officers on the night in question. Obviously, such information constituted probable cause for arrest. Under the circumstances, the police officers had good reason to believe that Earl Buchanan would not sit idly by while an arrest warrant was obtained and he was taken into custody. Earl and Calvin Buchanan were given their rights and taken to police headquarters.

Once at headquarters, Plaintiff was kept in a room by himself and handcuffed to a chair in order to prevent him from walking about and becoming a security risk. Opportunities were provided to telephone counsel, which he did, and to use the restroom facilities.

Detective Cheser, lead investigator on the Short Stop robbery, was called at home and arrived at headquarters at approximately 5:30 a.m. Detective Cheser was briefed on the situation and then began to prepare for the line-ups.

There were seven line-ups conducted between approximately 11:40 a.m. and 1:00 p.m. Earl Buchanan's counsel, public defender Ray Clooney, was present. Detective Cheser was responsible for conducting the line-ups.

Theresa McCrocklin, a witness to the Short Stop robbery was present during the line-ups, positively identified Earl Buchanan as one of the participants in the robbery. She signed a statement to that effect (Exhibit 1 to Cheser Affidavit).

Earl Buchanan was then formally charged with robbery, and placed in the custody of the Metropolitan Corrections Department. A grand jury indictment for the subject

charges was obtained on March 4, 1981 (Exhibit 1 to Grimes Affidavit). Mr. William C. Grimes, Assistant Commonwealth Attorney, handled the case for the Commonwealth.

The Short Stop robbery was eventually dismissed based on a prosecutorial decision. Earl Buchanan was convicted on another outstanding unrelated offense on June 11, 1981, and sentenced to the Eddyville State Penitentiary as a persistent felony offender. The case against Earl Buchanan for the Short Stop robbery was dropped on June 24, 1981, the date originally set for the Short Stop robbery trial, because Mr. Grimes felt that such action was in the interest of judicial economy in light of Plaintiff's then recent conviction on the persistent felony offense for which he was sentenced to 20 years in the penitentiary. Further, the identification of Plaintiff by the witnesses was impeachable (see Affidavit of William Grimes).

The Plaintiff subsequently filed a civil rights complaint under 42 U.S.C. §1983 on September 29, 1982, more than one year after the arrest was made and the robbery charge dismissed.

As stated previously, Defendants have proposed that Plaintiff's action should be dismissed and Defendants should be granted summary judgment. First and foremost, there was probable cause to arrest and prosecute the Plaintiff thus barring any liability under 42 U.S.C. §1983 arising from the execution of the police officers' sworn duty to uphold the law and protect the citizenry. In addition, Plaintiff's action is barred by Kentucky's one year statute of limitations governing actions for false arrest and malicious prosecution. Thus, Defendants are entitled to a judgment as a matter of law because the Plaintiff has failed to raise any genuine issues of material fact and, in any event, his lawsuit is barred by the applicable statute of limitations.

ARGUMENT

I. Defendant Police Officers Had Probable Cause to Arrest, and Prosecute the Plaintiff, Thus Barring Any Liability Under 42 U.S.C. §1983 for Alleged Damages Arising From the Execution of Their Duty.

Early in the morning of January 14, 1981, a Jefferson District Judge issued properly executed warrants for the search of a residence and the arrest of Calvin Buchanan, a suspect in a notorious murder/robbery. During the execution of these warrants, Earl Buchanan was also taken into custody based on information provided by one Kevin Stanford in a confession and which was corroborated by what the officers personally knew at the time and observed at the location of the arrest. This included the following facts: that Earl Buchanan fit the description of a suspect to the Short Stop Food Mart robbery on December 24, 1980; that a sawed off shot gun matching the description of the one used in the Short Stop Food Mart robbery and identified in the search warrant was found at the residence wherein Earl and Calvin Buchanan were sleeping; and that Earl Buchanan's sister lived in the apartments behind the Short Stop Food Mart, the same direction in which the robbers reportedly ran. In addition, police officers had good reason to believe Earl Buchanan would flee if not taken immediately into custody.

When substantial and truthworthy evidence reveals that a violation of the law has been committed and that it is more likely than not that the person to be arrested committed the violation, probable cause to arrest exists.

The Defendant officers had entered the premises with a valid search and arrest warrant for Calvin Buchanan. Earl Buchanan's subsequent arrest was incidental to the execution of the arrest warrant for Calvin Buchanan and the execution of the search warrant for 3703 W. Kentucky

Street, Louisville, Kentucky, the residence where Calvin and Earl Buchanan were found.

The affidavits and exhibits attached hereto unquestionably support Defendants' contention that the Plaintiff was arrested with probable cause. It has been held that:

> "A police officer who arrests someone with probable cause or a valid warrant is not liable in a §1983 suit for unlawful arrest. See *Hunter* v. *Clardy,* 558 F. 2d 290 (5th Cir. 1977); *Perry* v. *Jones,* 506 F. 2d 778 (5th Cir. 1975); *Mundy* v. *Georgia,* 586 F. 2d 778 (5th Cir. 1978).

In *Mundy* v. *Georgia, id.,* photographic identifications which were allegedly suggestive were supplemented by other information that placed the defendant in the area of the criminal activity. Thus, the additional information constituted sufficient probable cause. In the instant case, the fact that Kevin Stanford's statement implicating Earl Buchanan was later suppressed as it related to his own criminal prosecution does not alter the fact that it provided probable cause for this Plaintiff's arrest. This Circuit has so held in *Calvin Buchanan* v. *Jefferson County, et al.,* (6th Cir.) No. 82-5131. Order dated May 24, 1982, p. 3 (attached along with a copy of this Court's Memorandum Opinion in the same case). Further, as in *Mundy,* the police officer defendants verified the information gained from Stanford when they found the sawed off shotgun described in the search warrant and by witnesses to the Short Stop robbery. It is evident the Defendant police officers arrested the Plaintiff upon proper and sufficient probable cause.

Any allegations of malice on the part of the police are simply unfounded. It is crucial to note that the facts supporting the arrest were eventually placed before the Grand Jury who indicted the Plaintiff on March 4, 1981 for the

Short Stop robbery. The independent decision of indictment by the Grand Jury can be viewed as nothing less than an endorsement of probable cause relieving the arresting officers of any possible liability for false arrest and malicious prosecution. It is a situation analogous to the issuance of an arrest warrant by an independent magistrate. There is a plethora of case law that a valid arrest warrant protects a state officer from §1983 liability. *Carroll* v. *United States,* 267 U. S. 132 (1925); *Walker* v. *United States,* 125 F. 2d 395 (5th Cir. 1942); *Lopez* v. *Modisitt,* 488 F. Supp. 1169 (W.D. Mich. 1980).

It has been established for over 150 years that in the Commonwealth of Kentucky the finding of an indictment against the accused by the grand jury is prima facie or presumptive evidence of probable cause for the criminal prosecution. *Garrard* v. *Willet* (4 J.J. Marsh), 27 Ky. 628 (1830).

On June 24, 1981 the Commonwealth Attorney's Office through prosecutor William Grimes made a motion to dismiss the case against Earl Buchanan for the Short Stop robbery based on "insufficient evidence." According to Grimes, the captioned phrase was used as a term of art, for the true reason the case was dismissed was in the interest of judicial economy and infirmities in the witness identification of the perpetrators. The Plaintiff had been convicted on another unrelated charge as a persistent felony offender and received a 20 year sentence just 13 days before the Short Stop robbery trial date. Because the Plaintiff was already going to spend a substantial period of time in the penitentiary and because of the questionable identification, Mr. Grimes decided to dismiss the case. As the Grimes Affidavit states, this action had no bearing whatsoever upon the Defendant officers investigation and arrest of Earl Buchanan.

In the instant case, the Court is faced with a situation where the Defendant police officers acted in a proper and commendable manner while executing their sworn duties but are being subjected to a frivolous and harassing lawsuit by an oft convicted felon. As eloquently stated by the Supreme Court in *Pierson* v. *Ray*, 386 U. S. 547, 555 (1947):

> "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."

Based upon the foregoing, it is readily apparent Plaintiff's suit should be dismissed as a matter of law because the Defendant police officers patently had probable cause to arrest and prosecute the Plaintiff, thus barring any liability under §1983. The Grand Jury indictment alone irrebuttably shields these Defendants from any liability. Therefore, Defendants request this Honorable Court to quickly terminate this preposterous lawsuit.

II. Plaintiff's Action is Barred by Kentucky's One Year Statute of Limitations Governing Actions for False Arrest, Malicious Prosecution and Depreciation of Civil Rights.

The purpose of a statute of limitation is to prevent a plaintiff from bringing stale claims against a defendant. Such statutes prescribe limitations on the right to bring certain causes of action unless brought within a specified period of time after the right accrued.

42 U.S.C. §1983 does not contain a limitation of action period for suits brought under its purview. However, it is well settled than in a suit filed under 42 U.S.C. §1983, the:

> ". . . federal district court must apply the statute of limitations of the state where it sits which would be applicable in the most closely analogous state action to determine the time with in which a cause of action

must be commenced." *Carmicle* v. *Weddle,* 555 F. 2d 554, 555 (6th Cir., 1975).

The Supreme Court has also stated that the state statute of limitations which governs similar state actions will apply to federal civil rights actions brought under 42 U.S.C. §1983. *Board of Regents of New York* v. *Tomanio,* 446 U. S. 478 (1978).

The gist of Earl Buchanan's complaint is that he was unconstitutionally arrested and maliciously prosecuted. Thus, the applicable Kentucky statute of limitation is that provided in KRS 413.140(1)(c):

> "The following action shall be commenced within *one year* after the cause of action accrued:
> (c) an action for *malicious prosecution,* conspiracy, *arrest,* . . . (emphasis added)."

This Court has previously held that the one year statute of limitation applies to actions brought under the Civil Rights Act alleging malicious prosecution. *Carmicle* v. *Weddle, supra; Farris* v. *Sears Roebuck & Co.,* 415 F. Supp. 594 (W.D. Ky., 1976). It is equally obvious that the one year limitation of action period provided in KRS 413.140 (1)(c) should apply in this case since it also is an action alleging false arrest.

The affidavits and exhibits submitted with this memorandum conclusively demonstrate that the arrest upon which the Plaintiff's claim is based accrued on January 14, 1981 and therefore, the clock began to run on Plaintiff's false arrest claim from that date. The dismissal of the robbery charge is dated June 24, 1981 at which time Plaintiff's malicious prosecution claim ripened. Since Plaintiff filed his suit against the Defendants on September 29, 1982, some 20 months after the alleged false arrest and some 15 months after the dismissal of the robbery charge, it is

beyond cavil that the one year statute of limitations should apply to the Plaintiff without exception and that the Plaintiff's entire cause of action is beyond the applicable statute of limitations and should be dismissed as matter of law.

CONCLUSION

The function and purpose of summary judgment is to prevent vexation and delay, promote the expeditious and just disposition of cases and to avoid unnecessary trials where no genuine issues of material fact are raised.

Plaintiff alleges in his complaint the Defendant officers willfully and conspiratorially conducted an unlawful search and seizure, wrongfully arrested Plaintiff and maliciously prosecuted him thus depriving him of his constitutional rights. Mere allegations in the complaint do not constitute proof of triable issues. In light of the affidavits, exhibits and this tendered memorandum of law, it is obvious Plaintiff's claim is no more than a veratious attempt to harass public servants by way of a fictitious claim.

The Defendants direct the Court's attention to the attached affidavits of Detective Walter Tangel, Detective Eugene Cheser and Mr. William Grimes, along with the exhibits tendered with them. This evidence conclusively demonstrates that there is no genuine issue of material fact as to the probable cause which existed to arrest and prosecute Plaintiff. The subsequent dismissal has no bearing whatsoever on the probable cause question. Even if Plaintiff was telling the truth about his innocence, the constitution does not insure that only the guilty will be arrested. *Baker* v. *McCollan,* 443 U. S. 137 (1979). Further, Plaintiff's suit is barred by the applicable one year statute of limitations. There can be no dispute as to the date of the arrest, January 14, 1981, the date the charges were dismissed, June 24, 1982, and the fact that Plaintiff's lawsuit was filed September 29, 1982, 20 months after the

subject arrest and 15 months after the subject charges were dismissed.

The Defendants are entitled to a judgment in their favor as a matter of law since the Plaintiff has failed to raise any genuine triable issues of material fact in this siut and, in any event, his suit was not timely filed within the applicable statute of limitations.

Respectfully submitted,

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 81-0257 L(A)

CALVIN BUCHANAN, - - - - - *Plaintiff,*

v.

COUNTY OF JEFFERSON,
COMMONWEALTH OF KENTUCKY, - - - *Defendants.*

MEMORANDUM OPINION—Entered February 10, 1982

Plaintiff Calvin Buchanan brought this action pursuant to 42 U.S.C. Sec. 1983, alleging that he was illegally arrested on or about January 14, 1981, physically abused, cruelly treated, and deprived of life, liberty and property without due process of law and equal protection of law. He further alleged that he had been illegally arrested and that the acts and conduct of defendants, Roemele, Spellman, Tangel, Howard, Hall, Cheser, and Jones were maliciously and intentionally performed.

These defendants have filed their affidavits and, in addition, there have been filed the affidavits of Kenneth G. Corey, District Judge for the 30th Judicial District of Kentucky, and of Richard FitzGerald, District Judge for the same District of Kentucky. Following the filing of these affidavits, defendants moved for summary judgment and the matter has been thoroughly briefed. In addition, there have been filed the depositions of defendants Hall and Cheser.

On January 8, 1981, a woman named Baerbell C. Poore was found deceased in the rear seat of her automobile. Investigation revealed that she had been shot twice in the head. She was the owner of and had been reported missing from the Checker Service Station, 4501 Cane Run Road, Louisville, Kentucky.

On January 13, 1981, Kevin N. Stanford, a 17 year old black, gave a statement to defendant Tangel, in which he related that he had, along with the plaintiff Calvin Buchanan and a person named Troy, last name unknown, entered the Checker Service Station and robbed the female attendant of cash and cigarettes. He further stated that she was sodomized at the station and then abducted to the place where her body was found, where she was sodomized again and shot by plaintiff Buchanan. He stated that the weapon used in the shooting was in the possession of Buchanan, and that it was a sawed-off shotgun and the property of a person known as "Doc" who lived with Buchanan. He then directed Tangel to 3703 West Kentucky Street, stating that Buchanan and Doc lived there.

All of the Stanford information was contained in an affidavit which Tangel presented to Judge Corey on the 14th of January, 1981. Pursuant to that affidavit, Judge Corey issued a search warrant and an arrest warrant, and plaintiff Buchanan was apprehended and placed in the Jefferson County Jail. Very shortly thereafter, on the 16th of January, plaintiff made a phone call which was recorded and which was made to his nephew. With plaintiff's permission, it was listened to by Lt. Spellman. The phone conversation was exculpatory and, as a result, plaintiff's nephew was arrested and charged with the crimes, and the charges against plaintiff were dismissed on January 20, 1981. However, he remained in jail for some 16 more days because of various bench warrants which had been served upon him.

The affidavits filed by each of the police defendants and unrebutted by any affidavits from the plaintiff, show that there was no valid contention that plaintiff was subjected to any physical abuse. Plaintiff, however, contends that summary judgment should not be granted because the arrest warrant was issued based on false information given to Tangel by the 17 year old Stanford.

The general rule is that an arrest made under authority of a properly issued warrant is simply not a false arrest. It is a true and correct one. See *Rodriguez* v. *Ritchey,* 556 F. 2d 1185 (5th Cir. 1977). An officer who acts pursuant to a judicially approved warrant, valid on its face, is protected from a suit for damages arising out of its issuance. *Carroll* v. *United States,* 267 U. S. 132 (1925), *Walker* v. *United States,* 125 F. 2d 395 (5th Cir. 1942), *Lopez* v. *Modisitt,* 488 F. Supp. 1169 (W.D. Mich. 1980). These authorities dispose of plaintiff's claim for false or unconstitutional imprisonment. These authorities also dispose of plaintiff's claim for false arrest.

As held by District Judge Gibson in *Lopez* v. *Modisitt, supra,* it is not the duty of a police officer who executes a false arrest warrant to independently investigate every claim of innocence. We also believe that a police officer who has the duty to investigate a heinous crime, and who is given a statement by an alleged aider and abettor of the crime implicating others who participated in the crime, and who is furnished information showing that the informant knows the residence of the alleged perpetrator, and who independently knows that the alleged perpetrator was a felon, should present such facts to a magistrate in order to obtain an arrest warrant, and certainly acts with probable cause.

It is, of course, axiomatic that the defendant police officers are not liable for any bureaucratic delay which may have ensued between the dismissal of the murder charges

against plaintiff and the time when he was released. Apparently he was validly detained during those 16 days, but even if he was not, no liability extends to the named police officers who have no control over his detention, and who executed bench warrants for plaintiff's arrest on charges of possession of marijuana and drunk in a public place. The validity of the warrants are not in dispute here.

Finally, we note that the plaintiff has produced no evidence that would in any way indicate a violation of his constitutional rights by defendants McConnell, Helm, the County of Jefferson, or the Commonwealth of Kentucky. The Commonwealth of Kentucky is a sovereign state and is immune from liability under 42 U.S.C. Sec. 1983. See *Quern* v. *Jordan,* 440 U. S. 332 (1979). As to the County of Jefferson, no proof is shown of any custom, policy or practice that would indicate that it was sanctioning any violation of the constitutional rights of the plaintiff. See *Monell* v. *Department of Social Services, City of New York,* 436 U. S. 658 (1978). As to defendants McConnell and Helm, it is established under the case of *Rizzo* v. *Goode,* 423 U. S. 362 (1976) that personal liability under 42 U.S.C. Sec. 1983 may not be imposed upon the superiors of allegedly offending policy officers unless they have actively participated or acquiesced in constitutional misconduct.

Here, there is no such showing. We have, therefore, this day entered our summary judgment dismissing all of the defendants with prejudice.

Dated 2/10/82

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Civil Action No. C 82-0623-L(A)

EARL MILES BUCHANAN, - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, et al., - - - - *Defendants.*

AFFIDAVIT

Comes the Affiant, Detective Walter A. Tangel, after being duly sworn, states as follows:

1. I am a Detective with the Jefferson County Police Department and have been so employed for the past 7 years. I have been in the homicide/robbery department for the past 4 years.

2. On January 14, 1981, Lt. John Spellman, Sgt. Bill Howard, Lt. Col. Fred Roemele, Det. Hall, Det. Conway, Det. Hash, several uniformed city officers, and myself, were at 3703 W. Kentucky Street, for the purpose of executing an arrest warrant for Calvin Buchanan and executing a search warrant for the premises (both attached as Exhibit 1).

3. While at the aforesaid residence, we found Earl Buchanan who was sleeping in the same room with Calvin Buchanan. Earl Buchanan was arrested on information provided to the county police by Kevin Stanford who was already in custody for participating in the same robbery/murder for which Calvin Buchanan was being sought. Stanford had advised us early in the morning of January

14, 1981, that Earl Buchanan and David Buchanan robbed the Short Stop Food Mart at 1811 Old Third Street Road with a sawed off shot gun on December 24, 1980.

4. My notes reflect that Earl Buchanan and Calvin Buchanan were transported to headquarters from 3703 W. Kentucky Street by Sgt. Bill Howard and myself. We left the residence at approximately 3:05 a.m. and arrived at headquarters at approximately 3:16 a.m.

5. During the execution of the search warrant and the arrest of Calvin Buchanan, Earl Buchanan was found sleeping in the same bedroom with Calvin Buchanan.

6. There was probable cause to arrest Earl Buchanan based upon the facts:

(a) Kevin Stanford implicated him in the Short Stop robbery saying he participated and provided the gun.

(b) A sawed off shot gun which fit the description of the one used in the Short Stop robbery was found in the search of 3703 W. Kentucky Street.

(c) Earl Buchanan fit the description of one of the subjects involved in the offense.

(d) Colleen Brookins, sister of Earl Buchanan and mother of David Buchanan, lived in the apartments directly behind the Short Stop Food Mart; the direction in which the robbers fled.

(e) I believed that Earl Buchanan would flee if he was not immediately arrested.

7. While in route to headquarters, I gave Earl Buchanan his Miranda rights.

8. At headquarters, Earl Buchanan was kept in a room by himself in order to prevent him from walking around freely and becoming a security risk. One arm was handcuffed to a chair. This is standard procedure. Opportunities were provided to telephone counsel and use restroom facilities. At no time did I, or any other police officer

that I saw, violate any of the Plaintiff's legal or constitutional rights.

9. Someone from the department called Det. Cheser at home at approximately 4:30 a.m. and he arrived at headquarters at approximately 5:30 a.m. to set up the line-ups. Det. Cheser was called because he was the lead investigator in the Short Stop Food Mart robbery.

10. I left headquarters for home sometime around 6:30 or 7:00 a.m.

11. Subsequently, on March 4, 1981, the Grand Jury returned an indictment against Earl Buchanan for the Short Stop Food Mart robbery.

12. The foregoing facts are known to me to be true, based on my own personal knowledge.

Further, Affiant sayeth naught.

(s) Walter A. Tangel
Detective Walter A. Tangel

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS

Subscribed and sworn to before me by Detective Walter A. Tangel, this 12th day of January 1983.

My commission expires: August 20, 1983.

(s) Ellen M. Hesen
Notary Public

EDITOR'S NOTE

PAGES 25a through 28a WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Exhibit #1

DEFENDANT'S EXHIBIT #1

THE COMMONWEALTH OF KENTUCKY
Jefferson-District COURT

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON COUNTY

AFFIDAVIT IN SUPPORT of and PETITION FOR SEARCH WARRANT

Comes the affiant, *Walter Tangel*
a peace officer of JEFFERSON COUNTY POLICE DEPARTMENT
who personally appeared before the undersigned and being first duly sworn now on oath deposes, affirms and says that he has and there is reasonable and probable grounds to believe and affiant does believe that the said is on the premises known and numbered as *3703 West Kentucky St* in Jefferson County, Kentucky and more particularly described as follows:

Green weatherboard dwelling located on the north side of Kentucky St, the 9th house west of 36th Street.

and/or in (a) vehicle(s) described as

Lincoln Continetal Mark IV Grey color license unknown

Oldsmobile Delta 88 Green color license unknown

and/or on the person(s) of

Calvin Buchanan
Eurell Buchanan
Doc (last name unknown) residing at above location
Earl Buchanan D.O.B. 6-17-49

the following described personal property, to wit:

38 caliber pistol, brand unknown, Sawed off shot gun, gague and brand unknown. Assorted brands of cartoned cigarettees. Shoes worn by Calvin Buchanan. Tires from above described vehicles for comparison purpose from tire impressions at scene.

Affiant states that there is probable and reasonable cause to believe and affiant does believe that said property constitutes (check appropriate box or boxes)

(X) stolen or embezzled property;

(X) property or things used as the means of committing a crime;

(X) property or things in the possession of a person who has intention to use same as means of committing a crime or in the possession of another to whom any person may have delivered it for purpose of concealing it or preventing its being discovered;

(X) property or things which consist of evidence which tends to show that a crime has been committed or that a particular person has committed a crime.

262

Affiant has been an officer in the above agency for a period of 5 years years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 8 day of January ,1981, at approximately 12:42 a.m./p.m. affiant received information from/observed Baerbell C. Poore w/f/20 deceased in rear seat of her auto, 1973 Chevrolet Ky Lic# CLE 258 on Shanks Ln west of Oboe Dr. Further investigation revealed that Poore Subject had been shot twice in the head. Perpitrators of the crime had left both tire and foot print impressions in the snow. Baerbel Poore had been earlier reported missing from the Checker Service Station 4501 Cane Run Road where she was the propriator. On January 13, 1981 at 8:10 P.M. Kevin N. Stanford B/M/17 stated to the affiant that on January 7,1981 at approximately 7:30 P.M. he along with Calvin Buchanan B/M/33 and Troy (last name unknown) entered the Checker Service Station 4501 Cane run Rd and Robbed the female attendant of cash and cigarettees. Kevin Stanford further states that female attendant was sodimized at the station 4501 Cane Run Rd and then forcibly abducted to Shanks Ln and Oboe Dr where she was again sodimized and shot by Calvin Buchanan. Stanford states that he Calvin Buchan and Troy (last unk) were operating a 1972 Chevrolet Green color driven by Troy (last unk). Stanford states that weapon used in shooting was in possession of Calvin Buchanan both before the offenses and following the offense. Stanford further states that a sawed off shot gun was used in the offense and that this weapon along with the earlier described pistol was the property of a subject known only to him as "Doc" who resides with Calvin Buchanan at 3703 West Kentucky St Jefferson County Kentucky. Stanford subject directed affiant to 3703 West Kentucky St stating that Calvin Buchanan and "Doc" reside at this location. Stanford States that weapons are kept in Linc. Mark Iv at 3703 W.Kentucky St. Acting on the information received, affiant conducted the following independent investigation:

Checked city and County arrest files on Calvin Buchanan finding him to have alias of Eurel L. Buchanan with birth dates of

2-12-50 10-3-47 6-17-48 6-17-49

Subject was recently paroled 12-24-80 from Eddyville Penitentary from an armed robbery charge and conviction. Parole release information reveal new residence at 3703 West Kentucky St Jefferson County Kentucky.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a search warrant, based on the aforementioned facts, information and circumstances and prays that a search warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.

Walter A. Tangel
Signature of Affiant

Subscribed and sworn to before me on this 14th day of January ,1981 at 1:47 a.m./p.m.

Judge, [illegible] Jefferson District Court

Exhibit #1

THE COMMONWEALTH OF KENTUCKY

IN THE District COURT

OF JEFFERSON COUNTY KENTUCKY

DEFENDANT'S EXHIBIT #1

SEARCH WARRANT

To any policeman, sheriff, constable or other peace officer of the Commonwealth of Kentucky:

Proof by affidavit having this day been made before me by Walter Tangel, a peace officer of Jefferson County Police Department that there is probable and reasonable cause for the issuance of this search warrant as set forth in the affidavit attached hereto and made a part hereof as if fully set out herein; you are commanded to make immediate search of the premises known and numbered as 3703 West Kentucky St in Jefferson County / Kentucky and more particularly described as follows:

Green weatherboard dwelling located on the north side of Kentucky St the 9th house west of 36th street.

and/or (a) vehicle(s) described as

Lincoln Continental Mark IV Grey color license unknown

Oldsmobile Delta 88 Green color license unknown

and/or the person(s) of

Calvin Buchanan
Eurell Buchanan
Doc (last name unknown) residing at above location
Earl Buchanan, D.O.B. 6-17-49

for the following personal property, to wit:

38 caliber pistol, brand unknown. Sawed off shot gun, gauge and brand unknown. Assorted brands of cartoned cigarettees. Shoes worn by Calvin Bucahanan. Tires from above described vehicles for comparison purpose from tire impressions at scene.

and if you find same or any part thereof, to bring it forthwith before me or any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody subject to the order of such court.

Witness my hand the 14th day of January, 1981.

Judge, Jefferson District Court

Louisville Kentucky

27a

23719

CASE NO. 81 F 0 0 0 3 7 0

JEFFERSON DISTRICT COURT
79-315-A

WARRANT

☐ SUMMONS
☑ ARREST
☐ REJECTED
☐ MEDIATION Bail $100,000 F/C

_____ SERVED or _____ EXECUTED on the above named defendant this _____ day of _____ 19____

OFFICER _____

ACTION OF OFFICER _____

COMMONWEALTH OF KENTUCKY VS.

Name: Calvin Buchanan

Address: 3703 W Kentucky St

Alternate Address: _____

Race B Sex M Hr ____ DOB ~~2-10~~ 10/3/47

Ht 600 Wt 165 Eyes ____ Other _____

CERTIFIED COPY OF RECORD
OF JEFFERSON DISTRICT COURT
May 2, 1984
PAULIE MILLER, CLERK
BY Anita DATE Kendall D.C.

☑ WARRANT OF ARREST/TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:

You are hereby commanded to arrest the above-named defendant and bring him forthwith before the Judge of the DISTRICT COURT, JEFFERSON COUNTY, KENTUCKY (or, if he be absent or unable to act before the nearest available magistrate) regarding a complaint of Murder, Sodomy 1st, Robbery 1st, & Kidnapping filed by _____

☐ SUMMONS/TO THE ABOVE-NAMED DEFENDANT:

You are hereby summonded to appear before the Judge of DISTRICT COURT OF JEFFERSON COUNTY, KENTUCKY, on the _____ day of _____ 19____, at _____ M. at the following location: HALL OF JUSTICE, 600 WEST JEFFERSON STREET, COURT ROOM NO. _____, regarding a complaint of _____ filed by _____

If you fail to appear at the stated time and place you will be subject to the contempt power of the Court. Issued at LOUISVILLE, JEFFERSON COUNTY, KENTUCKY, this _____ day of _____ 19____.

Judge _____ JEFFERSON DISTRICT COURT.

CRIMINAL COMPLAINT

The affiant, OFF Tangel JCPD 6654 says that on the 7 day of Jan 1981 in JEFFERSON COUNTY, KENTUCKY, the above-named defendant unlawfully robbed, sodomyzed, and murdered Barbel C Poore at 4501 Cane Run Rd and Shanks Ln just west of Olde Pr. — Victim taken against will from Cane Run Rd Location ~~Area~~ to Shanks Lane where Murder Took Place

Name, address and telephone number of the Affiant.

Signature of Affiant X Walter A-Tangel

Sworn to before me this 14 day of Jan 1981.

J M Bray
Deputy Clerk/Mediation Officer

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0623-L(A)

EARL MILES BUCHANAN, - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, et al., - - - - *Defendants.*

AFFIDAVIT

Comes the Affiant, Detective Eugene Gene Cheser, after being duly sworn, states as follows:

1. I am a Detective with the Jefferson County Police Department and have been so employed for the past 22 years. I have been in the robbery department for the past 16 years.

2. That on January 14, 1981, at approximately 4:30 a.m., I received a call from someone at police headquarters informing me that Earl and Calvin Buchanan were in custody and that I was to come in and conduct the line-ups.

3. I arrived at headquarters at approximately 5:30 a.m. When I arrived, Earl Buchanan was in a small inner office with one arm handcuffed to the arm of the wooden chair he was sitting in. The office door was open at all times.

4. I told Earl Buchanan, to contact an attorney and gave him a telephone directory. I told him that if he did not call an attorney I would.

5. During this period of time, I was busy calling witnesses from several offenses and trying to locate fill-ins for the line-ups. It was very hectic in the office. No

other officers interviewed or talked with Earl Buchanan. I informed Earl Buchanan of his rights regarding the line-up. At no time while Earl Buchanan was in the custody of the Jefferson County Police Department did I, or any other officer that I saw, violate any of Earl Buchanan's legal or constitutional rights.

6. The line-up commenced as soon as Earl Buchanan's attorney, Ray Clooney, arrived and consulted with his client. Clooney arrived at approximately 11:30 a.m. and the line-ups commenced shortly thereafter. Earl Buchanan's counsel was present through all seven line-ups.

7. Earl Buchanan went willingly to the line-ups. His handcuffs were released; he did not struggle or attempt to flee when being taken to the line-ups. At no time was any unusual force used or necessary because of Mr. Buchanan's cooperative attitude.

8. A witness to the Short Stop robbery, Theresa McCrocklin, positively identified Earl Buchanan as one of the two robbers and signed a statement to that effect (Exhibit 1). Earl Buchanan was then formally charged and taken to Metro Corrections.

9. On March 4, 1981, I testified before the Grand Jury regarding the subject charges brought against the Plaintiff. The Grand Jury returned an indictment for those charges.

10. The foregoing facts are known to me to be true, based on my own personal knowledge.

Further, Affiant sayeth naught.

(s) Detective Eugene Cheser
Detective Eugene Cheser

STATE OF KENTUCKY
COUNTY OF JEFFERSON } SS

Subscribed and sworn to before me by Detective Eugene Cheser, this 12th day of January, 1983.

My commission expires: August 20, 1983.

(s) Ellen M. Hesen
Notary Public

DEPARTMENT OF PUBLIC SAFETY

JEFFERSON COUNTY POLICE HEADQUARTERS

338a

DATE 01/14/81

TIME 1251

YOU HAVE BEEN ASKED TO VIEW A LINE-UP FOR THE PURPOSE OF IDENTIFICATION OF A SUBJECT OR SUBJECTS INVOLVED IN A CRIME IN WHICH YOU ARE EITHER A WITNESS OR A VICTIM.

Eyewitness identification requires that you be absolutely certain of your identification in this Line-Up. No one must indicate to you or suggest to you which person to identify. The identification must be made entirely on your own. You will be required to testify in court regarding this Line-Up and the identification you have made.

I HAVE THIS DATE VIEWED A LINE-UP AT 600 W. Jefferson

AND HAVE POSITIVELY IDENTIFIED SUBJECT(S) 5 Negive

WITNESSED:

1. Det. Eugene Clusen
2. Det. Howard Netherry

SIGNED: Vivian McCracklin
name

525 E. 5th. Apt
address

1-14-81 date

13:51 time

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0623-L(A)

EARL MILES BUCHANAN, - - - - - - *Plaintiff,*

v.

JEFFERSON COUNTY, et al., - - - - - *Defendants.*

AFFIDAVIT

Comes the Affiant, William C. Grimes, after being duly sworn, states as follows:

1. I am a prosecutor for the Commonwealth Attorney's Office and have been so employed for two years.

2. I was responsible for handling the case against Earl Buchanan involving the robbery of the Short Stop Food Mart at 1811 Old Third Street Road, Louisville, Kentucky, on December 24, 1980.

3. I had the subject charges submitted to the Grand Jury on March 4, 1981, Detective Cheser testified at said hearing and an indictment for the subject charges was returned by the Grand Jury (attached Exhibit 1).

4. On my motion, charges against Earl Buchanan involving the Short Stop Food Mart robbery were subsequently dismissed on June 24, 1981. There were two reasons I made the prosecutorial decision to dismiss the charges. On June 11, 1981, less than two weeks prior to said dismissal, Earl Buchanan was convicted as a persistent felony offender with a recommended 20 year sentence. As a result, Earl Buchanan is now serving time in Eddyville

State Penitentiary. Although the motion to dismiss stated the reason "insufficient evidence", this was merely a term of art. The other substantive reason for dismissing the case, aside from the fact Earl Buchanan had been convicted on other unrelated charges, including a PFO sentence for a total of twenty years imprisonment, was the questionable identification of Buchanan by witnesses. Thus the case was dismissed in the interest of judicial economy in light of the fact that Earl Buchanan was already sentenced to the penitentiary for a substantial period of time and the witness infirmities; not because of any infirmities in the police officers investigation and arrest of Earl Buchanan.

5. In my professional opinion, as a Commonwealth Attorney with two years experience, after reviewing the facts and circumstances, I believe that the police investigation and subsequent arrest of Earl Buchanan for the Short Stop Food Mart robbery was properly performed.

6. As a Commonwealth Attorney, private defense counsel and public defender, I have known and worked with Detectives Tangel and Cheser in the past and I know them both to be good officers who are thorough investigators. In my experience these officers have always exhibited a keen awareness of defendants' rights in their investigative techniques.

7. I am professionally convinced that there was no wrongdoing, abuse or violation of constitutional rights in the search and seizure, arrest, imprisonment and prosecution of Earl Buchanan for the Short Stop Food Mart robbery on December 24, 1980.

Further, Affiant sayeth naught.

(s) William C. Grimes
William C. Grimes

State of Kentucky }
County of Jefferson } SS

Subscribed and sworn to before me by William C. Grimes this 12th day of January, 1983.

My commission expires: August 20, 1983.

(s) Ellen M. Hesen
Notary Public

JEFFERSON CIRCUIT COURT
DIVISION THIRTEEN (13)

VEALTH OF I NTUCKY
t Court, Criminal Division

81CR0263 (13)

FEBRUARY Term A. D., 1981

THE COMMONWEALTH OF KENTUCKY

Against

EARL MYLES BUCHANAN
AKA EARL MILES BUCHANAN
AKA ROBERT EUGENE HARTMAN

ROBBERY IN THE FIRST DEGREE
KRS 515.020 Class B Felony
10 to 20 years

PERSISTENT FELONY OFFENDER I
KRS 532.080 Indeterminate

39a

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 24th day of December, 1980, in Jefferson County, Kentucky, the defendant, Earl Myles Buchanan, acting alone or in concert with another, committed the offense of Robbery in the First Degree by threatening the use of physical force while armed with a sawed-off shotgun and in the course of committing a theft at the Short Stop Food Market located at 8811 Old Third Street Road.

COUNT TWO

Further, the defendant, Earl Myles Buchanan, also known as Earl Miles Buchanan, who is more than twenty-one (21) years of age, has previously been convicted for the following prior felonies and is now charged as being a Persistent Felony Offender in the First Degree as follows:

(1) That on or about the 7th day of August, 1973, the above named defendant appeared in the Daviess Circuit Court, Daviess County, Kentucky, a court of general criminal jurisdiction,

(1) EXHIBIT "1"

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

81CR0263 (13)

FEBRUARY Term A. D., 19 81

THE COMMONWEALTH OF KENTUCKY

Against

EARL MYLES BUCHANAN
AKA EARL MILES BUCHANAN
AKA ROBERT EUGENE HARTMAN

PAGE 2 OF 3

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

pursuant to Indictment No. 17317, charging him with Armed Robbery, a felony in violation of the Kentucky Revised Statutes; and that said court convicted and sentenced the defendant to thirty (30) years to serve in the penitentiary.

AND THAT PREVIOUSLY,

(2) That on or about the 6th day of February, 1968, the above defendant appeared in the Calhoun Circuit Court, Calhoun County, Michigan, a court of general criminal jurisdiction, pursuant to Indictment No. 23-288, charging him with Assault with Intent to Rape, a felony in violation of the Michigan Statutes Annotated; and that said court convicted and sentenced the defendant to not less than two and a half (2½) years nor more than ten (10) years.

AND THAT ALSO,

(3) That on or about the 6th day of February, 1968, the above defendant appeared in the Calhoun Circuit Court, Calhoun County, Michigan, a court of general criminal jurisdiction, pursuant to Indictment No. 23-287, charging him with Unarmed Robbery, a

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

81CR0263 (13)

FEBRUARY Term A. D., 1981

THE COMMONWEALTH OF KENTUCKY

Against

EARL MYLES BUCHANAN
AKA EARL MILES BUCHANAN
AKA ROBERT EUGENE HARTMAN

PAGE 3 OF 3

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The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

felony in violation of the Michigan Statutes Annotated; and that said court convicted and sentenced the defendant to not less than three (3) years nor more than fifteen (15) years, concurrent with Indictment No. 23-288.

ALL AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

A TRUE BILL

Raymond A. Johnson
FOREMAN

Wit.: Warren Southard, 9612 Brintannia Court;
Theresa McCrocklin, 525 East Southern Heights;
Richard Robinson, 191 Old English Court;
David King, Clerk, Jefferson Circuit Court, Hall of Justice;
John Glover, Probation and Parole, 660 River City Mall

Off.: W. Tangel, 6654; E. Cheser, 6095;
Sgt. W. Howard, 6277 JCPD

CERTIFIED COPY OF RECORD
OF JEFFERSON CIRCUIT COURT
PAULIE MILLER, CLERK
BY C. F. Malone D.C.

MAR 4 1981 19

RECEIVED, from the Foreman of the Grand Jury, in their presence, and filed in open Court.
ATTEST: PAULIE MILLER, Clerk
By M. Love D.C.

No. 82-5131

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CALVIN BUCHANAN - - - - *Plaintiff-Appellant*

v.

COUNTY OF JEFFERSON;
MITCH MCCONNELL;
EDGAR HELM;
LT. COL. ROEMELE;
LT. SPELLMAN;
DET. TANGEL;
SGT. W. HOWARD;
DET. HALL;
DET. CHESER - - - - *Defendants-Appellees*

ORDER—Filed May 24, 1982

BEFORE: KENNEDY and MARTIN, Circuit Judges; and GUY, District Judge.*

The plaintiff appeals the summary judgment for the defendants in this civil rights action. He now moves for appointment of counsel. That motion has been referred to this panel pursuant to Rule 9(a), Rules of the Sixth Circuit. Meanwhile, the plaintiff has filed an informal brief with this Court.

Following the robbery of a service station during which the female attendant was sodomized, kidnapped and murdered, the Jefferson County, Kentucky police arrested a juvenile as a suspect. He gave a statement to the police

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*The Honorable Ralph B. Guy, Jr., Judge, U. S. District Court for the Eastern District of Michigan, sitting by designation.

naming the plaintiff as the chief perpetrator of the above crimes and showed officers where the plaintiff resided. Based upon this information, the police prepared a search warrant for the residence and a warrant for the plaintiff's arrest. These were signed by a Jefferson County District Judge and promptly executed on January 14, 1981.

Two days later, the plaintiff was permitted to make a recorded telephone call to his nephew. As a result of that call, the police arrested the nephew. All charges against the plaintiff were dismissed on January 20, 1981, although he remained in custody sixteen days longer as the result of unrelated bench warrants for his arrest.

The plaintiff then filed this civil rights action seeking damages for his arrest and incarceration. In his complaint, he alleged the police knew or should have known that the juvenile was not telling the truth but that they nonetheless obtained a warrant for the plaintiff's arrest "with a knowing or reckless disregard for the truth." The defendants, who included seven individual officers who worked on the case as well as Jefferson County and its Judge Executive and Chief of Police, filed a motion for summary judgment supported by several affidavits of parties involved in the criminal investigation and the plaintiff's arrest, detention, and release. The plaintiff opposed the motion, but the district court granted summary judgment on grounds the defendants had probable cause to obtain the search and arrest warrants and could not be held liable under 42 U.S.C. §1983 for any damages arising from the execution of those warrants. It also held there was no evidence that Jefferson County or its Judge Executive or Chief of Police participated in the events related above, thus precluding any liability for damages on their part. This appeal followed.

The Supreme Court has noted that the Constitution "does not guarantee that only the guilty will be arrested."

Baker v. *McCollan*, 443 U. S. 137, 145 (1979). A policeman who executes a valid arrest warrant is not liable for damages under §1983 merely because the person arrested is later shown to be innocent. *Atkins* v. *Lanning*, 556 F. 2d 485, 487 (10th Cir. 1977); *Perry* v. *Jones*, 506 F. 2d 778, 780 (5th Cir. 1975); *McCloud* v. *Tester*, 391 F. Supp. 1271 (E.D. Tenn. 1975).

Here, the plaintiff alleged the defendants obtained the arrest warrant knowing they had insufficient evidence to support such a warrant. Upon review of the record and the affidavits submitted by the defendants in support of their motion for summary judgment, this Court finds the district court did not err in finding the arrest warrant supported by probable cause. See *Smith* v. *Gonzales*, No. 80-3968 (5th Cir. March 15, 1982). Compare *Baskin* v. *Parker*, 602 F. 2d 1205 (5th Cir. 1979); *Guerro* v. *Mulhearn*, 498 F. 2d 1249, 1256 (1st Cir. 1974). The fact the juvenile's statement was later suppressed as it related to his criminal prosecution does not alter the fact it provided probable cause for the plaintiff's arrest warrant at the time it was obtained and executed. *Cf. Mundy* v. *State of Georgia*, 586 F. 2d 507 (5th Cir. 1978).

Upon consideration of the motion for the appointment of counsel,

It is ORDERED that said motion be and it hereby is denied.

This panel, after examination of the record and the plaintiff's informal brief, agrees unanimously that oral argument is not needed in this appeal, Rule 34(a), Federal Rules of Appellate Procedure, and finds it manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Accordingly,

It is ORDERED that the district court's summary judgment of February 10, 1982 be and it hereby is affirmed. Rule 9(d)3, Rules of the Sixth Circuit.

Entered by Order of the Court

(s) John P. Hehman
Clerk

Issued as Mandate: July 12, 1982

Costs: None